SUBJECT INDEX

PAGE

Motion for Substitution of Present Trustee in Bankruptcy for Removed Trustee as Respondent 1

Order approving trustee's bond 2

Brief for the Respondent in Opposition 3

Opinions below and jurisdiction 3

Statement of the case 3

Argument 6

Conclusion 11

TABLE OF AUTHORITIES CITED

CASES	PAGE
Consolidated Rock Products Co. v. DuBois, 312 U. S. 510	8
Dollar Dry Cleaning Co., Inc., In re, 33 Fed. Supp. 861	7
Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U. S. 520	8
John Hancock Mutual Life Ins. Co. v. Casey, 141 F. 2d 104	8
RULES	
Rules of the United States Supreme Court, Rule 19:1(b)	6
STATUTES	
United States Code, Title 11, Sec. 576	6
United States Code, Title 11, Sec. 636	7, 9

IN THE

Supreme Court of the United States

October Term, 1957
No. 868

In the Matter of
AQUA HOTEL CORPORATION (in reorganization),
Bankrupt.

Motion for Substitution of Present Trustee in Bankruptcy for Removed Trustee as Respondent.

Harry C. Levy respectfully moves this Honorable Court for an order substituting him, in his capacity as Trustee in Bankruptcy of the Estate of the Aqua Hotel Corporation, as Respondent herein, without prejudice to the proceedings already had in this action, and, as grounds therefor, shows to the Court that the opinion of the Ninth Circuit Court of Appeals held that the trustee in bankruptcy, who was in actual physical control and custody of the assets, was the only authorized representative of the creditors and the proper appellee therein, and that since said opinion has been filed that Sydney H. Kaye was removed as trustee of the estate of Aqua Hotel Corporation, Bankrupt, and movant was nominated by creditors, appointed by Court, and did qualify and now is acting as trustee in bankruptcy, see appended Order approving Bond of Trustee. Movant herewith appends his Brief in Opposition to Petition for Writ of Certiorari herein.

Dated: April 16, 1958.

Respectfully submitted,

CALVIN C. MAGLEBY,
Attorney for Harry C. Levy, Trustee in Bankruptcy of Estate of Aqua Hotel Corporation.

CHARLES L. GARNER,
Of Counsel.

"United States District Court for the District of Nevada.

In the Matter of Aqua Hotel Corporation, Bankrupt.

In Bankruptcy. No. 71.

ORDER APPROVING TRUSTEE'S BOND.

At Las Vegas, in said district on the 4th day of April, 1958.

The above named Aqua Hotel Corporation, having been duly adjudged a bankrupt on a petition filed by ~~(or against)~~ ~~him~~ it on the 14th day of February, 1956; and HARRY C. LEVY, of Las Vegas, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official ~~duties in the~~ amount fixed by the order of this court, viz., FIFTY THOUSAND and no/100 ($50,000.00) dollars;

IT IS ORDERED that the said bond be, and it hereby is, approved.

JOHN C. MOWBRAY,

Referee in Bankruptcy."

IN THE

Supreme Court of the United States

October Term, 1957.
No. 868.

In the Matter of
AQUA HOTEL CORPORATION (in reorganization),
Bankrupt.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth District.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below and Jurisdiction.

See Writ of Certiorari of Petitioners.

Statement of the Case.

The Aqua Hotel Corporation, a Nevada corporation formed March 15, 1955, by voluntary petition on the 14th day of February, 1956, instituted proceedings under Chapter 10 of the Bankruptcy Act. The Petitioner admitted not being able to pay their debts as they matured (P. 1[1]), also, even though the book assets included Organization Expense of $44,454.35 (p. 11) the deficit of the corporation was $53,453.50 more than the Capital (p. 10), and net loss of corporation during its 10 months of business

[1] "P" references are to pages in original Petition.

was $36,641.47 plus Capital Expense of $60,375.12 (p. 12).

On March 9, 1956, the Court ordered the Trustee to prepare and file Trustee's Report on Plan of Reorganization and scheduled a hearing on Plan or Report for May 11, 1956, but thereafter the hearing was extended until June 11, 1956.

On said June 11, 1956, the Trustee filed a report stating a plan could not be effected and the debtor corporation filed an Objection to said report and hearing on said Report and Objections thereto was set for September 17, 1956, with all parties directed to submit any plans of reorganization to Trustee before September 17, 1956. The hearing of September 17, 1956, on motion of Court, was vacated and reset October 4, 1956, but said Order was silent as to deadline for submission of a Plan of Reorganization to Trustee.

On October 4, 1956, Trustee filed a second Report stating a Plan was not feasible but this without knowledge that on September 29, 1956, the Debtor corporation and its two principal stockholders had filed Plans of Reorganization with the Court. On October 4, 1956, a hearing was held and Court indicated its intention to bring the proceedings to a close and adjudicate the Debtor a Bankrupt, also the Court requested authorities from Trustee and Debtor whether the Court had the power to adjudicate and thereafter Debtor failed to supply requested authorities.

This hearing was continued to November 5, 1956, and on November 5, 1956, the Debtor submitted to the Court evidence that the Replacement Cost of the Assets of the Debtor was $846,702.00, the land being worth $316,467.00 [R. 90[2]], but the court held that the proper appraisal was earning power and therefore denied the offer of proof. Also, on November 5, 1956, the Court denied approval of the Plans submitted by Debtor and its principal stockholders, further denied amendments thereof, further adjudicated Debtor a Bankrupt but withdrew Order so that Application for Allowances could be made, and further set hearing on allowances for November 20, 1956.

On November 20, 1956, Court refused written demand of Debtor for a jury trial on question of insolvency and adjudicated Debtor a Bankrupt and set December 4, 1956, for hearing on allowances.

On November 21, 1956, Court filed Order of Adjudication and on December 4 and 5, 1956, held hearing on applications for allowances and Court directed counsel to prepare formal Order of Adjudication. On December 21, 1956, an amended Notice of Appeal was filed.

No separate Findings of Facts or Conclusions of Law were filed with each of the forementioned orders, but that instead, the finding was made part of the Order and was solely a recital of the language of the Bankruptcy Act, Chapter 10.

---

[2]"R" references are to pages in Reporter's Transcript.

Argument.

Rule 19:1(b) of this Court sets out the Considerations governing reviews on Certiorari, and in the case at hand only three could conceivably have any application, namely, (a) Conflict between circuits, (b) question so important that settlement should be by this Court, and (c) such a radical departure sanctioned by Court of Appeals that this Court should excuse its power of supervision.

The Petitioners list 12 questions presented and the Respondent will use the Petitioners' numbers:

1. This question is now urged for the first time although reference thereto was made in the Appellant's Reply Brief to Circuit Court of Appeals at page 8.

The law, 11 United States Code, Sec. 576, is clear and there had been no entry of an order approving the plan; this was one of the major changes between 77-B proceedings and Chapter 10. No reason is given anywhere by the Petitioners why this is error; the reason for the consent of the Court is for a more orderly conduct of he proceedings and surely Congress has the power to enact such a section.

2. The District Court had before it a Report on Why a Plan Cannot Be Effected and a Plan consisting of but few thoughts—"give us back the assets, we'll find someone who will buy stocks and then we'll put in some gaming devices and in time all persons will get paid." The Plan did not meet a single test of being fair, equitable and feasible. Not one dollar was pledged, no guarantees were given, no management assured. The Plan was so totally lacking in content that it was not a bona fide Plan. At least 12 deficiencies were discussed in Court. It even proposed

the Court finance the starting of the venture. The pattern set up in Chapter 10 is clear, the Court is charged to apply sound business principles and in most cases must seek the outstanding professional assistance of Securities Exchange Commission, and nowhere in any proceedings have the Petitioners maintained the submitted Plans were, in fact, fair, equitable and feasible.

3. The Orders were made in open Court and in fact served on all counsel of record for the Debtor. Mr. Lavine, who was not served, was only an associate counsel. In fact, Mr. Lavine was present in Court when the Orders were made. It is hard for the writer to consider the question of service upon each one of four counsel representing a party so important as to require a decision of this Court. It is equally hard for the writer to see how the recital of the statutory language, 11 United States Code, Sec. 636, as a finding of fact and the basis of an order could, in fact, start an appeal time to run anew.

4. The notice of November 20, 1956, hearing stated that adjudication of Bankruptcy would be considered and this notice was not only sent to all parties of interest but published in a paper of general circulation.

5. This question appears to the writer to be the crux of the Petitioners' Writ of Certiorari. The District Court proceeded on the basis that proof of insolvency was not a requirement as to adjudication.

On the question of whether insolvency is an essential element before there can be an adjudication the case of *In re Dollar Dry Cleaning Co., Inc.* (D. C., Conn.), 33 Fed. Supp. 861, holds that it is not and some authorites

hold that *John Hancock Mutual Life Ins. Co. v. Casey* (1 Cir.), 141 F. 2d 104, is to the *contra,* and therefore now with *In re Aqua Corporation* (9 Cir.),—a conflict between circuits exists. But this overlooks that the *Hancock* case remark was entirely dicta, not an issue there decided and merely a limitation of a totally different concept. It further assumes that here solvency did, in fact, exist or at least the existence of evidence from which solvency could be proven. But this element is totally lacking; further, at all stages the Debtor failed, although requested, to assert that solvency would be a bar, and hence waived same.

Here we have a corporation which after formation was in business but 10 months and whose earning power was a loss of $36,641.47 plus Capital Expense of $60,375.12 [R. 11], and if the mandate of *Consolidated Rock Products Co. v. DuBois* (1941), 312 U. S. 510, and *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co.* (1943), 318 U. S. 520, is followed, that is, the proper valuation method is earning power of a going concern, the value would be zero, because it is impossible to capitalize a loss figure; the cold hard facts are that the Debtor was losing money even before it paid interest on secured indebtedness of stockholders. Therefore, an appraisal on the earning power just is not mathematically possible and with debts of more than $700,000.00 plus the stock, insolvency did in fact exist. It is our contention that any error in not spending moneys of the Reorganization Court for an appraisal, any error of refusing to have endless testimony on this sort of value, or that sort of value is, if error, harmless error.

The second part is briefly, where the facts clearly point to one course, must the District Court in its Order say

two and two by definition make four, or merely can the Court recite the language of the Statute as its findings. The stand taken by the Petitioners appears to be, after much study we have found a general statement of law that the Rules of Civil Procedure apply to Bankruptcy Matters, including Chapter 10 proceedings, and therefore the proceedings must be reopened, the Honorable Judge must spell out his reasons with particularity, further Petitioners must have an opportunity to challenge the probative value of each fact and of each rule of law regardless of how inconsistent it may be to the spirit of the Bankruptcy Act. It is our contention that the applicability of the Federal Rules does not mean that the hardest, the most time consuming, way must be used each time.

Simply, whether to adjudicate turns on what "in the opinion of the Judge may be in the interests of the creditors and stockholders," and in this mandate, 11 United States Code, Sec. 636, consistenf with the Court being required to give with particularity the reasons for each step in the Court of the proceeding? Also, the conduct of matters in the Bankruptcy Court is supposed to be efficiently handled with the review periods shortened with rules of evidence modified, with hearings generally on Petitions and Show Cause; are these practices consistent to the position suggested by Petitioners?

6. This question is implicitly stated in question 5 and nowhere does petition suggest that by remanding a different result will be had. Due Process does not require prolonged and endless litigation and also the Due Process argument was raised for the first time on appeal.

7. This question is merely a rephrasing of Question 5 and consists of the most favorable statements and sug-

gestions in argument at the various hearings. It should be remembered that some 91 various documents were filed in this proceeding prior to adjudication and 10 months of hearings and conferences had by the District Court; hence it is hard to see how the Petitioners can claim there was no evidence taken prior to adjudication. The book value assets of the Bankrupt Corporation by their own admission was but $558,855.70 and for a period of ten months these assets had lossed $97,016.59, hence it is hard for the writer to accept any $751,104.44 figure.

8. Inasmuch as insolvency is not a condition for adjudication, there is no requirement for it to be decided and further, Chapter 10 sets up a pattern of no jury trials.

9. This is a misstatement of fact; at no time did the principal stockholder meet hotel operating payrolls and other expenses incurred by Trustee. The hotel operating payroll and other expenses were incurred prior to the 14th day of February, 1956, the day of the filing of the original Petition herein and hence question presented, in fact, does not exist.

10. A hearing on the allowance for the corporation and creditors' attorney was held in the District Court who held no benefit to the estate. The law is clear, "appeals from all orders" means simply "all" not "only" orders relating to allowances.

11. This question is merely a rephrasing of Question 10 and the direction of the law is clear.

12. This question is merely a rephrasing of Question 5 and therein answered.

Conclusion.

In view of the foregoing, no valid reason for the granting of the Writ of Certiorari has been shown and we respectfully submit that the Petition for Writ of Certiorari be denied.

Dated: April 17, 1958.

Respectfully submitted,

CALVIN C. MAGLEBY,

Attorney for Harry C. Levy, Trustee in Bankruptcy of The Estate of Aqua Hotel Corporation.

CHARLES L. GARNER,

Of Counsel.